



Osage Nation Historic Preservation Office

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March 21, 2018

Secretary Marlene Dortch
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

RE: The Osage Nation's Opposition to Draft Report and Order (WT 17-79)

Dear Chairman Pai and Members of the Commission:

We write to oppose the draft Report and Order released on March 1, 2018, that purports to narrow the obligations of the Federal Communications Commission (FCC) under the National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA) and restricts tribal rights secured by those laws. The draft order's approach will be detrimental to tribal governments and tribal cultural and historic resources; it will do very little to encourage deployment of wireless service to areas, like ours, that need it most.

Fifteen years ago, the FCC stated that it was impractical for it to consult on thousands of existing, new, and proposed cell sites, despite its obligation to do so. In response, Indian Country endorsed the Tower Construction Notification System as an elegant solution that facilitated the telecommunications industry to work directly with tribal nations to address issues of concern so that it would be unnecessary in nearly all cases for the FCC to engage in consultation. The alternative, which will be the outcome if the current order is approved, is that tribal nations will demand direct consultations with the FCC on potentially hundreds of larger tower sites, a far slower process than the tribal-industry process.

The Commission has a trust responsibility to tribal nations, not to the wireless industry. The draft Report and Order does not reflect this trust responsibility and diminishes the Osage Nation's ability to protect its cultural and historic properties.

The draft Report and Order:

- (1) Concludes that small wireless facilities do not qualify as "undertakings" or "major federal actions," thereby circumventing protections of NHPA and NEPA;
- (2) Eliminates tribal fees for initial historic preservation assessments (which often number in the hundreds per month) by tribal governments, encouraging industry to exclusively rely on its own consultants whose understanding of Native culture is limited, rather than access the unique expertise of tribal nations with regard to impacts on their own cultural areas; and
- (3) Mischaracterizes the extent of formal consultation carried out prior to the release of the draft Report and Order by including listening sessions, briefings and other meetings that are not true consultations.



The Osage Nation is a federally recognized Indian tribe with an Ancestral Territory (ancestral territories and homelands) presently encompassing approximately 617 counties and parishes and the City of St. Louis in 15 states including Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Missouri, Ohio, Oklahoma, Pennsylvania, Texas, West Virginia, and Wisconsin. The Osage Nation finds that the proposed order, WT Docket No. 17-79, serves the interests of the industry at the expense of Osage Nation sovereignty; impedes, if not eliminates, its ability to participate in processes that protect its significant cultural, historic, and religious places; is inconsistent with Advisory Council on Historic Preservation guidance; violates federal law; and will be injurious to the public interest by eliminating historic and environmental protections.

The NHPA and NEPA, and their implementing regulations, have served the public interest for several decades in immeasurable ways, improving the lives of the citizens of the United States. They are not barriers. Characterization of these laws as barriers, obstacles, and impediments underscores the fact that the proposed order was authored entirely by the industry that will profit from its adoption. The FCC proposes to act on behalf of the industry rather than serving the public interest or respecting the trust relationship between the federal government and the Osage Nation. The Osage Nation has no objection to the function or product of the industry; it contends that the present process protects the public good while allowing for the development of the industry.

The process used in developing the proposed order, with respect to soliciting and considering input from Indian tribes, was highly ineffective and largely disrespectful. The Osage Nation was not properly consulted per the provisions of 36 CFR 800.14, the process by which a federal agency may develop alternative procedures for the satisfaction of the NHPA. Regardless of whether Indian tribes were appropriately consulted on the proposed order, however, it is plain that the FCC failed to consider the comments made by those Indian tribes.

Although the fact is largely ignored in the proposed order, small wireless facilities require FCC permits. These projects, though they may be built by private entities on private land, are undertakings (36 CFR 800.16(y)). The FCC does not, as others have pointed out, possess the authority to redefine federal undertaking to exclude these facilities from review pursuant to the NHPA and 36 CFR 800. Additionally, the proposed order fails to sufficiently characterize or define the referenced small wireless facilities in terms of their physical dimensions and offers reviewers no opportunity to provide informed input on whether these facilities have the potential to affect historic properties. Finally, the FCC does not possess the authority to develop program alternatives outside of the NHPA and 36 CFR 800.

With regard to fees, the Osage Nation does not profit from its review of proposed telecommunications projects submitted through the TCNS process. These funds offset the costs incurred by the Osage Nation, a result of the process established by the FCC. Should the FCC decide to eliminate the present system, the Osage Nation will be forced to adopt the standard Section 106 review process, placing an undue burden on it as well as the FCC and the industry. Rather than simply eliminating the process for reimbursing Indian tribes for costs incurred by them through participation in FCC's process, the Osage Nation strongly urges the FCC to facilitate a mutually beneficial solution.

Lastly, the proposed order does not provide support for the claims that the processes required by the NHPA and NEPA impede the development of telecommunications infrastructure, that the elimination or significant alteration of the present review process will have a beneficial effect on the development of this infrastructure, or that the elimination or alteration of the processes will have no adverse effect to places of cultural, historic, and religious concern for the Osage Nation. According to the FCC, there have been no adverse effects to historic properties under the present system. The Osage Nation contends that this is a positive result of the current process rather than a demonstration that there is no need for the process. The current process may require revision but it serves the interests of the Osage Nation, protects public



interest, facilitates consultation among the FCC and Indian tribes, and satisfies federal law and regulations.

Damage to tribal cultural and historic properties is often irreversible. Therefore, similar to other tribes throughout the country, we will have no recourse if the deployment of wireless technology results in the destruction of our tribal cultural and historic properties. We accordingly ask all Commissioners vote against adopting this draft Report and Order.

Sincerely,

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Osage Nation Historic Preservation Office Website
<https://www.osagenation-nsn.gov/who-we-are/historic-preservation>

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